

INCOME TAX (ADVANCE PRICING ARRANGEMENT) RULES 2012

PU (A) 133
7 May 2012

IN exercise of the powers conferred by paragraph 154(1)(b) of the Income Tax Act 1967 [Act 53], the Minister makes the following rules:

CITATION AND COMMENCEMENT

- 1(1) These rules may be cited as the Income Tax (Advance Pricing Arrangement) Rules 2012.
- 1(2) These Rules are deemed to have come into operation on 1 January 2009.

INTERPRETATION

- 2 In these Rules—

"transfer pricing methodology" means the methodology provided in the Income Tax (Transfer Pricing) Rules 2012 [P.U. (A) 132/2012];

"taxpayer" means a person who is assessable and chargeable to tax under the Act;

"advance pricing arrangement" means an arrangement made to determine in advance the appropriate set of criteria to ascertain the arm's length transfer prices of a covered transaction;

"Bilateral Advance Pricing Arrangement" and **"Multilateral Advance Pricing Arrangement"** means advance pricing arrangements provided under section 132 of the Act;

"Unilateral Advance Pricing Arrangement" means an advance pricing arrangement provided under section 138C of the Act;

"Competent Authority" means the Competent Authority referred to in any arrangement made under section 132 of the Act;

"covered period" means the basis period for a year of assessment covered under the advance pricing arrangement;

"covered transaction" means a cross border transaction covered in the advance pricing arrangement.

SCOPE AND APPLICATION

- 3(1) Subject to these Rules, a taxpayer who carries on a cross-border transaction may apply to the Director General for an advance pricing arrangement in relation to a covered transaction for specified terms and conditions.
- 3(2) For the purpose of subrule (1), the arm's length transfer price in respect of an advance pricing arrangement shall be ascertained in accordance with section 140A of the Act, the Income Tax (Transfer Pricing) Rules 2012 and the arrangement made under section 132 of the Act.

REQUEST FOR PRE-FILING MEETING

- 4(1)** A taxpayer shall make a request in writing to the Director General for a pre-filing meeting in respect of an advance pricing arrangement twelve months prior to the first day of the proposed covered period.
- 4(2)** For the purpose of subrule (1), the taxpayer shall furnish together with the request a draft outline of the case to the Director General which shall consist of—
 - (a) the taxpayer's business model and industry information;
 - (b) the scope of the transaction and periods to be covered; and
 - (c) the proposed transfer pricing methodology and an explanation of whether the method accords with the arm's length principle.
- 4(3)** Upon receiving the draft outline of the case from the taxpayer, the Director General may require the taxpayer to furnish any other information relating to the request for a pre-filing meeting.
- 4(4)** The Director General shall notify the taxpayer within fourteen days after the pre-filing meeting of his decision on whether the taxpayer may proceed to submit an application for an advance pricing arrangement.

SUBMISSION OF APPLICATION FOR ARRANGEMENT

- 5(1)** Subject to subrule 4(4), a taxpayer may submit to the Director General an application for a Unilateral Advanced Pricing Arrangement, Bilateral Advanced Pricing Arrangement or Multilateral Advanced Pricing Arrangement in a prescribed form within two months after receipt of the notification.
- 5(2)** Upon receipt of the application, the Director General shall consider such application and may propose an alternative methodology, or restrict or expand the scope of the proposed advance pricing arrangement.

CIRCUMSTANCES WHERE ADVANCE PRICING ARRANGEMENT IS DECLINED

- 6(1)** The Director General may decline an application for an advance pricing arrangement under any of the following circumstances:
 - (a) failure to comply with the requirements under the Income Tax (Transfer Pricing) Rules 2012 and the Malaysian Transfer Pricing Guidelines issued by the Director General;
 - (b) where the proposed covered transaction is based on a hypothetical situation or not seriously contemplated;
 - (c) where it appears to be an inefficient use of resources to pursue an advance pricing arrangement if the proposed transaction is limited in nature and value, or the arm's length principle on the proposed transaction can reliably be applied without material doubt;
 - (d) where the matter on which the advance pricing arrangement is sought is subject to an appeal under section 99 of the Act; or
 - (e) where the proposed covered transaction involves a tax avoidance scheme.
- 6(2)** Where the application for an advance pricing arrangement is declined, the Director General shall inform the taxpayer in writing of the decision to decline the application and grounds for the decline.

6(3) The taxpayer may, within thirty days from receipt of the decision under subrule (2), make a representation to the Director General for a further review of the application of the taxpayer and the decision by the Director General on the representation shall be final.

WITHDRAWAL OF ADVANCE PRICING ARRANGEMENT APPLICATION

7 A taxpayer may withdraw an advance pricing arrangement application at any time before the arrangement is concluded by giving a notice in writing to the Director General.

POWER TO REQUEST FURTHER INFORMATION

8 The Director General or the Competent Authority may, at any time, request the taxpayer to furnish further information and documents which the Director General or Competent Authority considers relevant to the application submitted.

CRITICAL ASSUMPTIONS

9(1) The taxpayer shall, in his application for an advance pricing arrangement, identify the assumptions made in developing the proposed transfer pricing methodology which are critical to the reliability of the methodology under the arm's length principle.

9(2) In this rule, "**critical assumption**" means any assumed objective criterion that would significantly affect the terms of an advance pricing arrangement if the underlying conditions changed, whether or not the change is within the control of a person which may include any fact or condition about the person, a third party or an industry, such as a new business strategy or a mode of conducting operations, or the cessation or transfer of a business segment or entity, or circumstances that would materially affect the suitability of the transfer pricing methodology or its application.

OPINION BY INDEPENDENT EXPERT

10(1) The taxpayer may, at his own cost and expense, engage an independent expert, if the taxpayer considers it necessary to advise him on the application for an advance pricing arrangement.

10(2) The opinion by the independent expert shall not be binding on the taxpayer, the Director General or the Competent Authority.

10(3) In this rule, "independent expert" means a person with specialized skills or knowledge relevant to an advance pricing arrangement.

EFFECT OF ADVANCE PRICING ARRANGEMENT

11 Where—

- (a) the Director General and the taxpayer have entered into a Unilateral Advance Pricing Arrangement; or
- (b) the Competent Authority has entered into a Bilateral Advance Pricing Arrangement or Multilateral Advance Pricing Arrangement;

the arrangement shall, during the covered period, constitute a binding undertaking on the parties to the arrangement that the transfer price ascertained for the covered transaction is determined in accordance with the arrangement.

COVERED PERIOD UNDER ADVANCE PRICING ARRANGEMENT

12 The covered period under an advanced pricing arrangement shall be a minimum of three years of assessment and a maximum of five years of assessment.

REQUEST FOR ROLLBACK

13(1) A taxpayer may request to the Director General for a rollback of an advance pricing arrangement if—

- (a) the proposed transfer pricing methodology is relevant to the resolution of the transfer pricing issues in the prior years' assessment; and
- (b) the particular facts and circumstances surrounding the prior years' assessment are substantially the same.

13(2) For the purpose of this rule, "rollback" means the application of the terms and conditions of an advance pricing arrangement to prior years' assessment.

FILING OF ADVANCE PRICING ARRANGEMENT COMPLIANCE REPORT

14(1) Where a taxpayer has entered into an advance pricing arrangement, the taxpayer shall furnish the Director General a compliance report for each year of assessment of the covered period and the report shall be furnished within seven months from the date following the close of the accounting period which constitute the basis period for that year of assessment.

14(2) The compliance report referred to in subrule (1) shall include the following:

- (a) a copy of the relevant audited financial statements of the taxpayer and, in the case of Bilateral Advance Pricing Arrangement or Multilateral Advance Pricing Arrangement, a similar statement of the other person involved in the covered transaction;
- (b) a report of the relevant covered transaction and the amount required to be reported respectively by the taxpayer and, in the case of Bilateral Advance Pricing Arrangement or Multilateral Advance Pricing Arrangement, a similar report by the other person involved in the covered transaction;
- (c) a description of any material changes in the financial or tax accounting methods or principles employed in respect of the covered transaction that differs from the methods or principles stated in the advance pricing arrangement, and where there were no such material changes, an affirmative statement to that effect;
- (d) a description of any failure and the reasons for such failure to meet a critical assumption and where there has been no such failure, an affirmative statement to that effect;
- (e) an analysis of any compensating adjustments required under the advance pricing arrangement, and the manner in which the related payments were or will be made;
- (f) all information and computations to support the application of the transfer pricing methodology to the covered transaction;
- (g) documents pertaining to the particular circumstances of the taxpayer and the other person involved in the covered transaction;
- (h) all other relevant information and computations to support the application of the transfer pricing methodology to the covered transaction; and
- (i) other documents as may be relevant to the particular circumstances of the taxpayer and the other person involved in the covered transaction.

COMPENSATING ADJUSTMENTS

15 Where the results of the covered transaction is materially different from the advance pricing arrangement, the taxpayer shall make a compensating adjustment to ensure that the results of the covered transaction substantially conforms to the results that would have been arrived at if the transfer pricing methodology agreed to under the advance pricing arrangement is applied.

REVIEW OF ADVANCE PRICING ARRANGEMENT COMPLIANCE

16 The Director General shall review the advance pricing arrangement compliance report to establish whether the terms and conditions stated in the arrangement have been complied with.

REVISION OF ADVANCE PRICING ARRANGEMENT

17 The Director General may revise an advance pricing arrangement under any of the following circumstances:

- (a) failure of the taxpayer to meet the critical assumptions as provided in the arrangement; or
- (b) there has been a change in the law or the arrangement under section 132 of the Act that affects the advance pricing arrangement.

CANCELLATION OF ADVANCE PRICING ARRANGEMENT

18(1) The Director General or the Competent Authority, as the case may be, may cancel an advance pricing arrangement under any of the following circumstances:

- (a) if any of the person in the covered transaction in respect of that arrangement fails to comply with any term or condition of that advance pricing arrangement;
- (b) if any of the person in the covered transaction in respect of that arrangement makes an error or mistake in the advance pricing arrangement application, reports or renewal submissions;
- (c) if any of the person in the covered transaction in respect of that arrangement fails to provide information, documentation and compliance report as required under these Rules; or
- (d) if the revised advance pricing arrangement is not concluded.

18(2) The taxpayer may apply to the Director General for the cancellation of the advance pricing arrangement on reasonable grounds.

18(3) The Director General or the Competent Authority shall inform the taxpayer or the other Competent Authority of the cancellation in writing and the grounds for the cancellation.

18(4) The cancellation shall be effective as of the beginning of the basis period for the year of assessment which relates to the circumstances provided for in subrules (1) and (2).

REVOCATION OF ADVANCE PRICING ARRANGEMENT

19(1) The Director General or the Competent Authority, as the case may be, may revoke an advance pricing arrangement if any of the persons in the covered transaction in respect of that arrangement makes any misrepresentation, fraud, omission or makes a statement that is false or misleading in the advance pricing arrangement application, reports or renewal submissions.

19(2) The Director General or the Competent Authority shall inform the taxpayer or the other Competent Authority of the revocation in writing and the grounds for the revocation.

19(3) The revocation shall be effective from the first day of the first basis period for the year of assessment of the covered period.

RENEWAL OF ADVANCE PRICING ARRANGEMENT

20(1) A taxpayer may request the Director General or the Competent Authority to renew an advance pricing arrangement not later than six months before the expiration of that arrangement by submitting the appropriate supporting documentation similar to those required for the request and application of that arrangement.

20(2) The advance pricing arrangement may be renewed under similar terms and conditions if—

- (a) there has been no change in the facts and circumstances underlying the advance pricing arrangement;
- (b) the critical assumptions as identified by the taxpayer under rule 9 remain valid and relevant; and
- (c) the taxpayer has complied with the terms and conditions of the previous advance pricing arrangement.

20(3) The Director General or the Competent Authority shall inform the taxpayer of the decision in respect of the request in writing and the grounds for the decision.

20(4) A taxpayer may file a fresh application for an advance pricing arrangement if—

- (a) the covered transaction has changed;
- (b) there are material and anticipated changes in fact and circumstances of the covered transaction; or
- (c) a different transfer pricing methodology is proposed.

CONFIDENTIALITY OF INFORMATION

21 All information obtained by the Director General or the Competent Authority in respect of the advance pricing arrangement process is subject to the confidentiality provisions of the Act and the articles on Exchange of Information of the arrangement made under section 132 of the Act.

PERMANENT ESTABLISHMENT AS A SEPARATE ENTITY

22(1) For the purpose of these Rules, a permanent establishment shall be treated as a distinct and separate entity from its head office and related branches.

22(2) In this rule, "permanent establishment" —

- (a) shall have the same meaning assigned to it in the arrangement made under section 132 of the Act; or
- (b) if there is no arrangement made under section 132 of the Act, means a fixed place of business through which the business of a person is wholly or partly carried on, or a fixed place of business of another person, through which the particular person makes supplies.